

**KANESALINGAM AMPALAVANAR & ANOR v. MAJLIS
BANDARAYA PETALING JAYA & ORS**

HIGH COURT MALAYA, SHAH ALAM
VERNON ONG LAM KIAT J
[JUDICIAL REVIEW NO: 25-39-04-2013]
21 MARCH 2014

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LOCAL GOVERNMENT: *Building – Planning permission – Granting of – Change of use of land – Use of premises from residential to day care centre for children with special needs – Whether permission unlawful and contrary to provisions in National Land Code – Whether notices served on applicants as adjoining land owners defective – Whether applicants misled – Whether nullified planning permission granted by first respondent – Express condition imposed on land – Restriction on land – Whether first respondent could grant planning permission by virtue of s. 22(3) Town and Country Planning Act 1976 – Whether planning permission a restriction within of s. 108 National Land Code – Whether altered or changed character of building – Whether contravened land use and express condition as endorsed on register document of title – Planning Control (General) Selangor Rules 2001, rr. 7 & 10*

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LAND LAW: *Planning permission – Granting of – Application for certiorari to quash decision – Change of use of land – Use of premises from residential to day care centre for children with special needs – Whether permission unlawful and contrary to provisions in National Land Code – Whether notices served on applicants as adjoining land owners defective – Whether applicants misled – Whether nullified planning permission granted by first respondent – Express condition imposed on land – Restriction on land – Whether first respondent could grant planning permission by virtue of s. 22(3) Town and Country Planning Act 1976 – Whether planning permission a restriction within s. 108 National Land Code – Whether altered or changed character of building – Whether contravened land use and express condition as endorsed on register document of title – Planning Control (General) Selangor Rules 2001, rr. 7 & 10*

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CIVIL PROCEDURE: *Parties – Judicial review – Whether public law proceedings – Action against local authority and owner of premises – Planning permission – Granting of – Application for certiorari to quash decision of local authority – Whether owner of premises involved in decision made by local authority – Whether proper to add owner of premises as respondent in action – Whether application allowed – Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors*

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WORDS & PHRASES: *‘express condition’ – National Land Code, s. 120 – Meaning of – Whether conditions imposed to run with land – Whether bound registered proprietor of land*

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A WORDS & PHRASES: ‘planning permission’ – *Town and Country Planning Act 1976, s. 2 – Meaning of – Whether first respondent as local authority had power to grant planning permission*

B WORDS & PHRASES: ‘restriction’ – *National Land Code, s. 108 – Meaning of – Restriction imposed by local authority or planning authority upon owner of land – Planning permission – Express condition in register document of title – Whether there was planning restriction imposed on premises*

C The first respondent (‘MBPJ’) granted planning permission for the temporary change in the use of a single storey bungalow building (‘the premises’) from residential to day care centre for special children. The applicants were owners of a single storey bungalow and the premises was adjacent to the applicants’ bungalow. The third respondent was the owner of the premises which was let to Persatuan Orang Kurang Upaya Bangsar Ria (‘the society’) for the operation of a day care centre for children with special needs. The applicants’ appeal to the Appeals Board in relation to

D MBPJ’s decision was rejected on the grounds that they did not have the *locus standi*. *Vide* this judicial review application, the applicants sought an order of *certiorari* to quash the decision of the first respondent in granting the said planning permission. It was argued, *inter alia*, that (i) the planning permission was given unlawfully since it was contrary to ss. 104, 105(2)

E and 108 of the National Land Code (‘NLC’); (ii) the change of use allowed by MBPJ was contrary to the express condition endorsed on the register document of title; and (iii) the notices served on the applicants were defective since it was not in accordance with the prescribed form as stipulated in the Planning Control (General) Selangor Rules 2001 (‘the Rules’).

F MBPJ, however, argued that it had exercised its powers under s. 22(3) of the Town and Country Planning Act 1976 (‘the TCPA’) when it granted planning permission for the premises to be used as a day care centre for children with special needs. Further, it was asserted that s. 108 of the NLC did not apply since the TCPA was not a local by-law and thus, MBPJ

G had the right under the TCPA to grant planning permission for change of use of land. The third respondent argued that the applicants could not join him as a party to this proceeding since judicial review proceedings could only be instituted against public bodies or bodies performing a function involving a public law element. The issues that arose for consideration, *inter alia*, were (i) whether the planning permission was null and void for being

H inconsistent with the express condition endorsed on the register document of title to the land upon which the premises was located; and (ii) whether the planning permission which was granted to change the use of the premises from ‘residential’ to ‘day care centre for special children’ was a restriction within the meaning of s. 108 of the NLC.

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Held (dismissing application):

- (1) Based on s. 2 of the TCPA, the word 'planning permission' means permission granted, with or without condition, to carry out development. Since MBPJ is a local authority within the meaning of the TCPA, it exercised its powers *qua* a local authority in granting the planning permission. (paras 26 & 27)
- (2) An express condition is a condition that is attached to any land that is alienated by the state authority to a person or body. An express condition that is imposed on any land shall run with the land and binds the registered proprietor of the land (ss. 104 and 120 NLC). Section 108 of the NLC provides, *inter alia*, that whenever there is a conflict between the condition under the NLC and any by-law or any restriction imposed by the local authority or local planning authority, the condition shall prevail. The word 'condition' appearing in s. 108 refers to the express condition under s. 104 of the NLC. On the facts, the express condition stipulated was 'residential'. Since the TCPA was not a by-law, it follows that s. 22(3) of the TCPA which confers power on MBPJ to grant planning permission was not in conflict with the NLC as provided under s. 108 of the NLC. (paras 29, 31, 34 & 35)
- (3) The word 'restriction' in s. 108 of the NLC should be construed as a restriction imposed by the local authority or planning authority upon the owner of the land. On the facts, there was no statutory restriction or planning restriction imposed on the premises contrary to the express condition of 'residential'. As such, the planning permission was not a restriction within the meaning of s. 108 of the NLC. (paras 37 & 40)
- (4) The fact that the single storey bungalow was a residential building was consistent with the land use and express condition which stipulated that the building (land use) on the land must be a residential building (express condition). The fact that planning permission had been granted for the carrying out of a day care centre for special children did not alter or change the character of the residential building on the premises. Therefore, the planning permission which was granted was not inconsistent with or contravened the land use and express condition as endorsed on the register document of title. (paras 42 & 43)
- (5) Rule 7 of the Rules provides for a notice in Form A to be served on adjoining owners. The notice which was served on the applicant was not in accordance with the prescribed Form A. However, the applicants were aware of the fact that the application was for the change in the use of the premises from a residential to a day care centre for special children which was also stated in the notice. Any deviation from the prescribed form does not automatically invalidate the form unless the

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- A deviation had no substantial effect and was not calculated to mislead. The deviation had no substantial effect since the applicants were duly informed of the nature of the application for planning permission. (paras 44, 47, 48 & 49)
- B (6) The applicants were given a copy of the site plan which showed the subject lot and neighbouring lots together with a form for their comments and objections to be filled and submitted to MBPJ. All the relevant particulars and materials had been provided to the applicants. As such, there was no evidence to show any intention to mislead. Further, r. 10 of the Rules provides that a notice of the planning permission granted should be given to any person who has made an objection. The requirement in r. 10 is not mandatory and was only directory. The fact that no notice in Form B was given to the applicants was not a procedural irregularity which had the effect of nullifying the grant of the planning permission. (paras 50 & 51)
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- D (7) Judicial review proceedings are public law proceedings. It is concerned with enforcing public duties on behalf of the public as a whole. On the facts, the impugned decision relates to the decision of MBPJ to grant planning permission to the society. The third respondent did not make the application for the planning permission nor operated the day care centre and only tenanted out the premises to the Society after the planning permission was granted. In the circumstances, the third respondent ought not to have been made a party in the judicial review proceedings (*Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors*; refd). (para 52)
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- F **Case(s) referred to:**
Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd [2011] 7 CLJ 121 FC (refd)
Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC (refd)
Dr Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor [1981] CLJ 134A; [1981] CLJ (Rep) 142 HC (refd)
- G *Keck Seng (Malaysia) Bhd v. Pentadbir Tanah, Johor Bahru* [1996] 3 CLJ 573 HC (refd)
Land Executive Committee of Federal Territory v. Syarikat Harper Gifillan Bhd [1980] 1 LNS 150 FC (refd)
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC (refd)
- H *Mohamad Ilyan Yahya & Ors v. Majlis Perbandaran Subang Jaya & Ors* [2014] 1 LNS 1743 CA (refd)
Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors [2013] 10 CLJ 663 HC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA (refd)
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Toh Huat Khay v. Lim A Chang [2008] 2 CLJ 718 CA (*refd*)
Trustees of the Kheng Chiu Tin Hou Kong and Burial Ground v. Collector of Land Revenue (Housing and Development Board) [1992] 1 SLR 425 (*refd*)

Legislation referred to:

Interpretation Acts 1948 and 1967, ss. 62, 66
National Land Code, ss. 104, 105(2), 108, 120
Planning Control (General) Selangor Rules 2001, rr. 7, 10
Town and Country Planning Act 1976, ss. 2, 16, 19, 21(6), 22(3), 36(13)

For the applicants - V Jeya Kumar (Aston Paiva with him); M/s Kanesalingam & Co
For the 1st respondent - Lim Fang Say (Azian Shaharum with him); M/s Azian & Co
For the 3rd respondent - J Rohan Arasoo; M/s Kadir, Andri & Partners

Reported by Kumitha Abd Majid

JUDGMENT

Vernon Ong Lam Kiat J:

[1] In this application for judicial review, the applicants are seeking an order of *certiorari* to quash the decision of the first respondent granting planning permission for the temporary change in the use of a single storey bungalow building from “residential” to “day care centre for special children”.

Brief Account Of The Salient Facts

[2] The applicants are the owners of a single storey bungalow known as No. 38, Jalan Seksyen 12/14, 46200 Petaling Jaya, Selangor.

[3] The single storey bungalow in respect of which planning permission was granted by Majlis Bandaraya Petaling Jaya (MBPJ) (first respondent) on 24 August 2011 for the change in the use from “residential” to “day care centre for special children” is known as No. 40, Jalan Seksyen 12/14, 46200 Petaling Jaya, Selangor (‘the premises’). According to the register document of title to the premises, the land use is stated to be “building”. The premises is adjacent to the applicants’ bungalow.

[4] The third respondent is the owner of the premises.

[5] Pursuant to a tenancy agreement dated 1 January 2013, the premises were let to Persatuan Orang Kurang Upaya Bangsar Ria (‘the society’) for the operation of a day care centre for children with special needs. There are presently nine children with special needs being taken care of at the premises between the hours of 8am to 5pm, Mondays to Fridays.

A Applicants' Case

Illegality

B [6] Learned counsel for the applicants argued that the planning permission which was granted for the change in the use of the premises was given unlawfully as the express condition endorsed on the register document of title to the premises stipulates that the building must be a dwelling house. As such, the planning permission is contrary to ss. 104, 105(2) & 108 of the National Land Code (NLC). In support of his proposition, learned counsel also referred to *Keck Seng (Malaysia) Bhd v. Pentadbir Tanah, Johor Bahru* [1996] 3 CLJ 573; *Land Executive Committee of Federal Territory v. Syarikat Harper Gifillan Bhd* [1980] 1 LNS 150; [1981] 1 MLJ 234; *Dr. Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor* [1981] CLJ 134A; [1981] CLJ (Rep) 142; [1982] 1 MLJ 38; *Toh Huat Khay v. Lim A Chang* [2008] 2 CLJ 718; [2008] 4 MLJ 74 CA).

D [7] Learned counsel also argued under s. 16 of the Town and Country Planning Act 1976 (TCPA 1976), the third respondent must first obtain the approval of the State Authority to change the category of land use prior to making an application for planning permission (*Malaysian Town and Country Planning – Land and Procedure* by Assoc Prof. Ainul Jaria binti Maidin, CLJ Publication 2012).

E [8] The change of use allowed by MBPJ is contrary to the express condition endorsed on the register document of title and is therefore unlawful, null and void.

Procedural Impropriety

F [9] Learned counsel for the applicants argued that the Form A which was given to the applicants by MBPJ is defective as it did not show the purpose for which the application for development/planning permission was made (r. 7 of the Planning Control (General) Selangor Rules 2001) (“the Rules”). Further, MBPJ failed to issue the Form B Notice to Objector of Grant of Planning Permission to the applicants (r. 10, the Rules).

G [10] As a consequence of the aforesaid, the decision of MBPJ is bad for non-compliance of the Rules.

No Alternative Remedy Available

H [11] The applicants’ appeal to the appeal board was rejected on the grounds that they did not have the *locus standi*. As the appeal board’s decision was predicated on the fact that since there was no Form B served on the applicants, there was no decision on record to appeal against.

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MBPJ's Answer**A***Illegality*

[12] Learned counsel for MBPJ argued that MBPJ is a local authority within the meaning of the TCPA 1976. As such it had the power to make changes in the use of land (s. 2 of the TCPA 1976).

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[13] In granting planning permission for the premises to be used as a day care centre for special children, MBPJ was exercising its powers under s. 22(3) of the TCPA 1976. The planning permission which was granted included a change in the use of land which falls within the definition of "development" under s. 2 of the TCPA 1976. As planning permission had been granted the third respondent was entitled to use the premises as a day care centre. This is in accordance with ss. 2 and 19 of the TCPA 1976.

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[14] Learned counsel also argued that s. 108 of the NLC did not apply because the TCPA 1976 is not a local by-law. The TCPA 1976 is an Act of Parliament. Therefore, the question of the NLC prevailing over the TCPA 1976 does not arise.

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[15] As such, MBPJ has the right under the TCPA 1976 to grant planning permission for change of the use of the land. The power to grant planning permission is independent of the NLC (*Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2011] 7 CLJ 121; [2012] 2 MLJ 168 FC).

E*Procedural Impropriety*

[16] Learned counsel argued that any deviation from the prescribed Form A would not invalidate the form (s. 62 of the Interpretation Acts 1948 and 1967). The purpose of the Form A notice was to inform adjoining/neighbouring owners that an application for planning permission and to inform them of their right to object to the application (r. 7, the Rules).

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[17] At any rate, the Form A fulfils the purpose set out under s. 21(6) of the TCPA 1976 in that it has informed and notified the applicants of the application for planning permission and of their rights to object to the application within 21 days of receipt of the notice.

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[18] Learned counsel also contended that the purported deviation in the Form A did not have any substantial effect on its contents. The applicants were not misled by the Form A notice. The applicants had lodged their objections to MBPJ *via* letter dated 3 May 2011.

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[19] The applicants also attended the meeting held by MBPJ on 6 May 2011 to hear objections from relevant parties. The applicants voiced their objections at the meeting.

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A *No Alternative Remedy Available*

[20] The applicants have exhausted their remedies by appealing to the Appeals Board.

B [21] The TCPA provides that the decision of the Appeals Board is final and shall not be called into question in any court (s. 36(13) of the TCPA 1976). However, the Appeals Board is an inferior tribunal which has no jurisdiction to make an error of law. As such, the ouster clause does not immunise the Appeals Board from judicial review (*Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 CA).

C [22] Therefore, it was contended that the applicants ought to have challenge the decision of the Appeals Board by way of judicial review. Since the decision of the Appeals Board was made on 13 February 2013, the applicants are out of time to challenge the decision.

D **Third Respondent's Answer**

E [23] Learned counsel for the third respondent's argument is grounded on three main points. Firstly, the applicants did not have a basis for making this judicial review application. The applicants failed to disclose that the third respondent had only tenanted the premises to the society for the operation of a day care centre premised on the planning permission granted by MBPJ. As such, the third respondent had complied with all relevant rules, regulations and laws. The neighbours surrounding the premises had not raised any objections towards the third respondent tenanting the premises to the society.

F [24] Secondly, the applicants cannot join the third respondent as a party in the judicial review proceedings. Judicial review is primarily concerned with enforcing public duties on behalf of the public as a whole. As such, judicial review proceedings can only be instituted against public bodies or bodies performing a function involving a public law element or consequence (*Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors* [2013] 10 CLJ 663; *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224; *Mohamad Ilyan Yahya & Ors v. Majlis Perbandaran Subang Jaya & Ors* [2014] 1 LNS 1743).

G [25] The third respondent had complied with the TCPA 1976 and Akta Pusat Jagaan 1993. Pursuant to the Rancangan Tempatan Petaling Jaya 1 and Pekeliling PTG. Sel 4/98, a day care centre for children with special needs can be operated from the premises.

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Decision Of The Court**A**

[26] In this case MBPJ granted planning permission for the premises to be used as a day care centre for children with special needs pursuant to s. 22(3) of the TCPA.

[27] According to the TCPA, the words “planning permission” means permission granted, with or without condition, to carry out development. “Development” is defined to mean “the carrying out of any building, engineering, mining, industrial or other similar operation in, on, over or under land, the making of any material change in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands; and “develop” shall be construed accordingly” (s. 2 of the TCPA 1976).

B**C**

[28] As the MBPJ is a local authority within the meaning of the TCPA (see s. 66 of the Interpretation Acts 1948 and 1967), it exercised its powers qua a local authority in granting the planning permission in question.

[29] The principal issue for determination relates to the question of whether the planning permission is null and void for being inconsistent with the express condition endorsed on the register document of title to the land upon which the premises is located.

D*Express Condition Under NLC – Effect Of***E**

[30] The applicants’ argument turns on the fact that the premises is subject to the express condition “Residential”. What is an express condition and what is the effect of the express condition? An express condition is a condition that is attached to any land that is alienated by the State Authority to a person or body (s. 120 of the NLC). An express condition that is imposed on any land shall run with the land and binds the registered proprietor of the land (s. 104 of the NLC).

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[31] As a starting point, it is necessary to consider the applicants’ contention that the express condition prevails over the planning permission thereby rendering the planning permission null and void. In particular, learned counsel referred to s. 108 of the NLC which provides as follows:

G**108. Conflict with local by-laws, etc.**

Where any land affected by any by-law of, or restriction imposed by, any local authority or planning authority becomes subject by virtue of this Act to any condition which is inconsistent therewith, the condition shall prevail, and the by-law or restriction shall, to the extent of the inconsistency, cease to apply to the land.

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[32] Section 108 of the NLC provides, *inter alia* that whenever there is a conflict between the condition under the NLC and any by-law or any restriction imposed by the local authority or local planning authority, the condition shall prevail. The word “condition” appearing in s. 108 refers to the express condition under s. 104 NLC. In this case, the express condition stipulated is “residential”.

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- A [33] Section 108 of the NLC makes explicit reference to two types of conflict – (i) “any by-law”; and (ii) “any restriction”. What is the meaning of the words “by-law” and “restriction” within the context of s. 108 of the NLC?

“By-Laws” – Meaning Of

- B [34] According to Anandan Krishnan, *Words, Phrases & Maxims Legally And Judicially Defined Lexis Nexis 2008*, the words “by-laws” is described as:

C A by-law denotes etymologically a law for the regulation of the ‘by’ or township. *Arnold’s Municipal Corporation* 7th Ed. At 150; It was in modern times been held to mean rules made by some authority subordinate to the legislature for the regulation, administration or management of a certain district and binding upon all persons who come within their scope *Law Relating to Meetings by Shakelton*, at 410. In *Kruse v. Johnson*, Russel CJ defined it as meaning ‘an ordinance affecting the public, or some portion of the public imposed by some authority clothed with statutory powers ordering something to be done or something not to be done and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts but which but for the by-law they would be free to do or not to do as they pleased. Further it involves the consequence that if validly made it was the force of law within the sphere of legitimate operation.

E ‘By-Law’ includes all orders, ordinances, regulations, rules, and statutes made by any authority subordinate to the Legislature. The subordinate authority must, of course, have power expressly or impliedly conferred on it to legislate on the matter to which the by-law relates.

- F The terms ‘by-laws’, ‘ordinances’ and ‘municipal regulations’ have substantially the same meaning, and are the laws of the corporate district made by the authorised body, in distinction from the general laws of the state. They are regulations for the government of the inhabitants of the particular place. They are not laws in the legal sense, though binding on the community affected. They are not prescribed by the supreme power of the state, from which alone a law can emanate, and therefore cannot be statutes which are the written will of the Legislature, expressed in the form necessary to constitutes parts of the law.
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- H [35] Is the TCPA 1976 a by-law or a statute? It is patently clear that the TCPA is an Act of Parliament; as such, it is a statute. Therefore, the TCPA is not a by-law.

[36] Since the TCPA 1976 is not a by-law, it follows that s. 22(3) of the TCPA 1976 which confers power on the MBPJ to grant planning permission is not in conflict with the NLC as provided under s. 108 of the NLC.

- I “Restriction” – Meaning Of

[37] Whilst the word “restriction” has not been defined in any written law, in its widest sense it refers to a limitation on the use or enjoyment of something, in this case land in its widest sense. According to Anandan

Krishnan, *Words, Phrases & Maxims Legally And Judicially Defined*, Lexis Nexis 2008 the word “restriction” means statutory restrictions and also planning restrictions in so far as they may legitimately be taken into account in determining whether or not to approve or reject an application to develop land in conformity with the Planning Act (Cap 232) and rules and regulations made thereunder (*Trustees of the Kheng Chiu Tin Hou Kong and Burial Ground v. Collector of Land Revenue (Housing and Development Board)* [1992] 1 SLR 425 @ 435). A
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[38] Applying the principles stated above, the word “restriction” appearing in s. 108 of the NLC should be construed as a restriction imposed by the local authority or planning authority upon the owner of the land. And to the extent such restriction is inconsistent with the express condition in the register document of title, the restriction shall not have any effect. C

[39] In this case, can it be said that the planning permission which was granted to change the use of the premises from “residential” to “day care centre for special children” is a restriction within the meaning of s. 108 of the NLC. D

[40] It is not disputed that the application for the planning permission was made by the society. The third respondent who is also the registered proprietor of the premises did not object to the application. E

[41] On the facts of this case, there is absent of any statutory restriction or planning restriction imposed on the premises contrary to the express condition of “residential”. Accordingly, the court finds that there is no restriction imposed by MBPJ which is inconsistent with the express condition. Accordingly, the planning permission is not a restriction within the meaning of s. 108 of the NLC. F

[42] It is also pertinent to note that the premises is a single storey bungalow and it is a residential building. It was to all intent and purposes a residential home prior to it being used to operate as a day care centre for special children. G

[43] The fact that the single storey bungalow is a residential building is consistent with the land use and express condition which stipulates that the building (land use) on the land must be a residential building (express condition). As such, there is no breach of with the land use “building” and express condition “residential” as endorsed on the register document of title. H

[44] The fact that planning permission has been granted for the carrying out of a day care centre for special children did not alter or change the character of the residential building on the premises. Therefore, the planning permission which was granted by MBPJ is not inconsistent with or contravenes the land use and express condition. I

A *Whether Form A Defective?*

B [45] The applicants also contend that the Form A did not show the purpose for which the application for planning permission was made. Rule 7 of the Planning Control (General) (Selangor) Rules 2001 provides for a notice in Form A to be served on adjoining owners. The notice which was served on the applicants is not according to the prescribed Form A. Instead it is entitled “Notis Pemakluman Mendapatkan Pandangan Kepada Pemunya Tanah Berjiran”.

C [46] The notice in question which was served on the applicants state that an application had been submitted by one Saraswathy Manikam for planning permission to change the use of the building from “residential” to “day care centre for special children”. The notice enclosed a site plan of neighbourhood and a form for the applicants to complete and submit to MBPJ. It also gave the applicants 21 days to submit their views or objections to the MBPJ. There was compliance with the requirements under s. 21(6) of the TCPA 1976.

E [47] In fact, the applicants did send a letter dated 3 May 2011 to the MBPJ setting out their objections to the application for planning permission. The applicants also received a letter from the MBPJ inviting them to attend a meeting on 6 May 2011 at the premises of the MBPJ to give their views. Both the applicants attended the meeting.

F [48] On the aforesaid facts, the applicants were duly notified of the application for planning permission. They were aware of the fact that the application was for the change in the use of the premises from a residential to a day care centre for special children; this fact was also clearly spelt out in the notice. The applicants had the opportunity to present their objections twice – the first occasion in writing *vide* their letter dated 3 May 2011, and the second occasion orally at the meeting on 6 May 2011.

G [49] It is not disputed that the notice in question is not according to the prescribed Form A. However, any deviation from the prescribed form does not automatically invalidate the form unless the deviation has no substantial effect and is not calculated to mislead (see s. 62 of the Interpretation Acts 1948 and 1967).

H [50] Did the deviation have any substantial effect? On the facts abovementioned, the court is satisfied that the deviation has no substantial effect as the applicants were duly informed of the nature of the planning permission applied for.

I [51] Was there any intention to mislead on the part of MBPJ? A perusal of the notice in question will also show that the applicants were also given a copy of the site plan showing the subject lot and neighbouring lots together with a form for their comments and objections to be filled in and submitted

to MBPJ. All the relevant particulars and materials have been provided to the applicants. The applicants had put in their objections; they were heard and their views considered. In the circumstances, the court finds that there was no evidence to show any intention to mislead.

[52] The applicants also contended that MBPJ failed to issue the Form B Notice to Objector of Grant of Planning Permission to the applicants (r. 10, the Rules). Rule 10 provides that a notice of the planning permission granted should be given to any person who has made an objection. According to the *Oxford Advanced Learner's Dictionary*, the main use of the word "should" is to tell somebody what they ought to do, to give advice or to add emphasis. In other words, the requirement in r. 10 is not mandatory; it is only directory. Accordingly, the fact that no notice in Form B was given to the applicants is not a procedural irregularity which had the effect of nullifying the grant of the planning permission.

[53] In *Ringgit Exotica Sdn Bhd v. Pengarah Tanah & Galian Selangor & 2 Ors* [2013] 1 LNS 343, this court drew a distinction between public law and private law proceedings. Judicial review proceedings are public law proceedings; and as such are primarily concerned with enforcing public duties on behalf of the public as a whole. In this case, the impugned decision relates to the decision of the MBPJ to grant planning permission to the society. The third respondent did make the application for the planning permission. He did not operate the day care centre. He only tenanted out the premises to the society after the planning permission was granted. In all the circumstances, the third respondent ought not to have been made a party in the judicial review proceedings. If the applicants feel aggrieved by the operation of the day care centre for special children, they could have pursued their claim(s) against the third respondent for damages for nuisance in a civil action.

[54] For the foregoing reasons, the application is without merit. Accordingly the application is dismissed with costs to the first and third respondents.

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